UNITED
NATIONS

AT

Administrative Tribunal

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12 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 626

Case No. 676: SELVADURAI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Luis de Posadas Montero, Vice-President, presiding; Mr. Ioan Voicu; Mr. Francis Spain;

Whereas at the request of Timothy Selvadurai, a former staff member of the United Nations Environment Programme, hereinafter referred to as UNEP, the President of the Tribunal, with the agreement of the Respondent, successively extended to 7 December 1990, 7 September and 31 December 1991, 1 April and 30 June 1992, the time-limit for the filing of an application to the Tribunal;

Whereas, on 22 June 1992, the Applicant filed an application requesting, inter alia, the Tribunal:

> "...to instruct the Secretary-General and the Executive Secretary of UNEP to:
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> (a) Pay in a lump sum to the Applicant the thirty percent loss of pension, from the date of separation of the Applicant to the Applicant's 60th birthday;
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> (b) ... authorize damages to the Applicant and his family for economic, financial and physical stress;
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> (c) ... pay in lump sum to the Applicant an appropriate amount that the Applicant would have received from his 60th birthday to a life expectancy up to 80 years of age;

(d) ... pay to the Applicant all cost of living allowances for the loss of monies he would have received from the date of separation;

(e) ... pay in a lump sum to the Applicant all monies that would have been paid for health insurance, life insurance, dental insurance and hospital insurance from the date of his termination to his 60th birthday for himself, his wife and dependent children."

Whereas the Respondent filed his answer on 20 November 1992;

Whereas the Applicant filed written observations on 30 March 1993;

Whereas the facts in the case are as follows:

The Applicant entered the service of the United Nations on 16 May 1967, as an Administrative Officer for a UNESCO/UNDP project in Sri Lanka. From 15 August 1969, he worked as a Research and Programme Officer for UNDP, until his transfer, on 25 July 1974 to UNEP in Nairobi, on a fixed-term appointment of two years at the P-2, step IV level, as Special Assistant to the Assistant Executive Director. He served on a further two year fixed-term appointment and was promoted to the P-3 level, with effect from 1 April 1977.

The Applicant was reassigned to the Regional and Liaison Offices Unit with effect from 1 January 1978, as Administrative Officer. On 1 March 1979, he was appointed Chief, Regional Offices Co-ordination Unit. He served on a succession of further fixed-term appointments through 31 December 1986. He was promoted to the P-4 level, with effect from 1 April 1983.

On 1 January 1985, the Applicant was reassigned to the Office of the Environment Fund and Administration, Fund Management Branch, as Fund Management Officer (FMO). In a memorandum dated 20 January 1986, the Assistant Executive Director, Office of Environment Fund and Administration, informed the Applicant that "the Executive Director was completely dissatisfied with the presentation of ... fact sheets as submitted... " and concluded by stating: "It is the

Executive Director's position that if your performance does not improve, contractual consequences might result".

The Applicant's performance during the period 1 January 1985 through 28 February 1986, was evaluated in a performance evaluation report (the first report) in which the First Reporting Officer, the Chief, Fund Programme Management Branch, gave him five C ratings, eight B ratings and one A rating. The Deputy Assistant Executive Director, Fund and Management, as Second Reporting Officer, noted: "Overall [the Applicant's] performance falls somewhere between good and very good. The [Applicant] was posted into the Fund about one year ago against his wishes. He has worked hard but has found the work difficult. Overall, it seems unlikely that [the Applicant] will ever make an outstanding FMO and his talents would be better used elsewhere in the house." On 22 April 1986, the Applicant signed the report stating his intention to rebut it. He did so on 16 May 1986, in accordance with administrative instruction ST/AI/240/Rev.2. The Applicant's appointment was extended for a further fixed-term period of one year, through 31 December 1987.

The Applicant's performance from 1 March 1986 to 31 March 1987, was evaluated in a performance evaluation report (the second report), in which the Chief, Fund Programme Management Branch, gave him nine C ratings and four B ratings. His overall performance was rated as a "good performance". On 10 June 1987, the Applicant signed the report, stating his intention to rebut it. He did so, in accordance with administrative instruction ST/AI/240/Rev.2, on 7 July 1987.

On the same date, the Assistant Executive Director, Fund and Administration, informed the Applicant that the Executive Director had decided not to extend his fixed-term appointment beyond 31 December 1987. He stated:

> "In reaching this decision however, note was taken of the fact that the outcome of the rebuttal procedure for your two most recent Performance Evaluation Reports is not yet known. The above decision is therefore communicated to you without

prejudice to a review of the decision once the results of the rebuttal procedure are known.

Please treat this letter therefore as confirmation of the indication I gave to you verbally on 3 June 1987, that your appointment may not be extended beyond its expiry date. This confirmation is given at this time in accordance with the Executive Director's policy of advising staff of non-extension well in advance so that they may make their plans accordingly."

The Panel constituted to evaluate the rebuttal of the first report concluded, on 10 August 1987, as follows:

"15. ... Programme officers who dealt with [the Applicant] in a professional capacity, ... were all unanimous in their praise of his work and his co-operative spirit. Although he had started slowly, after familiarizing himself with his job, he was - in their collective opinion - an efficient and hard-working officer.

16. ... from the evidence it had at its disposal, the Panel is not able to make a recommendation as to the correctness of the ratings ... The Panel does see, however, a strong case for mitigating circumstances arising from the following facts:

(a) the sudden transfer of the [Applicant] to Fund Management for which he had no particular experience, a fact warranting a less rigorous assessment during the first evaluation;

(b) keeping the [Applicant] under the supervision of a first reporting officer whose previous evaluation of the [Applicant] had been strongly challenged by a second reporting officer;

(c) the management of the AGFUND projects, on which a great deal of the low ratings in the evaluation of the [Applicant] seems based, cannot be blamed entirely on him alone as the supervisors themselves had certain responsibilities which were apparently not discharged.

17. The Panel recommends that the Performance Evaluation report should not be used as a basis for the assessment of [the Applicant's] performance and

extension of contract, without due consideration of the Panel's observations in paragraph 16 above. At least, greater weight should be given to subsequent evaluations."

The Executive Director, in his appraisal of the report communicated to the Applicant on 9 October 1987, concluded:

"(a) that there should be no specific change in the text of the report;

(b) the report should be read in conjunction with paragraph 16 of the report of the Rebuttal Panel attached;

(c) that greater weight should be given to subsequent evaluations in assessing performance."

In its report dated 9 October 1987, the Panel constituted to investigate the rebuttal to the second report, concluded that:

"The recommendations of the panel would bring the [Applicant's] ratings to 8B and 5C. This will elevate his overall rating marginally closer to B, 'Very good'. ...:

...given the experience of the last yeras, [the Applicant's] continued encumberment of an FMO post may be untenable both from a substantive and personal point of view, particularly if daily contact with the FRO [First Reporting Officer] is to be maintained. The long standing strained relationship may preclude such an option. Reassignment elsewhere could, of course, open up opportunities for the continued use of [the Applicant's] services."

On 25 November 1987, the Chief, Personnel Section, transmitted to the Applicant a copy of the Executive Director's decision of 20 November 1987, on the changes to be made in the second report, pursuant to the recommendations of the rebuttal Panel, indcluding his decision to change the Applicant's overall rating to "Very Good".

In the interim, the Applicant had lodged an appeal with the Panel on Discrimination and Other Grievances (the Panel on Discrimination) whose Coordinator, on 10 December 1987, wrote to the Executive Director, asking that the Applicant's appointment be extended for two months, through 29 February 1988, to enable the Panel to complete its work. The Applicant's appointment was extended through 31 December 1987 and subsequently, by monthly extensions to 1 March 1988, when he separated from the service of UNEP.

On 22 January 1988, the Applicant requested the Secretary-General to review the administrative decision not to extend his fixed-term appointment.

On 18 February 1988, the Coordinator of the Panel on Discrimination transmitted to the Executive Director the Panel's report on the Applicant's case and its recommendations:

> "...
>
> The Panel has noted, through the documentation available to it, that the [Applicant] has served for 20 years with the United Nations, 13 of these years in UNEP in unbroken service. That during this period, the [Applicant] has been evaluated as much as 9 times in 11 years (before joining the Fund) by 7 officers in 5 different jobs. All PERs [Performance Evaluation Reports] have received 'Very Good' to near 'Outstanding' evaluations. It is perfectly clear to this Panel therefore, that [the Applicant] has demonstrated both mobility and capability during his career with the UN. The Panel has also noted that [the Applicant] has only another 5 years of active service before reaching the maximum retirement age of 60 years.
>
> Recommendations
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> In view of the foregoing, the majority of the Panel members (one member dissenting) would recommend an appeal to the Executive Director to exercise his discretion in implementing the Guidelines for extension of fixed-term appointments with regard to 'C ratings in specially important areas' and further review the [Applicant's] contract, considering that the [Applicant's] ratings and overall rating have

been upgraded to 'Very Good'. The Panel would recommend the reassignment of the [Applicant] to another office where, as has been demonstrated in his career over the past years, the Organization itself can benefit from his long service and experience."

In a letter dated 29 February 1988, the Chief, Administrative Service, informed the Applicant as follows:

"The Executive Director has again carefully reviewed the decision not to extend your Fixed-Term Appointment with UNEP which decision was first conveyed to you in June 1987 and reiterated in my letter to you of 10 December 1987. In doing so, he has also taken into consideration the report of the Panel on Discrimination and Other Grievances addressed to him dated 18 February 1988. I am sure you will realize this was not a decision lightly taken given your length of service with UNEP, but I regret that the decision communicated to you has been maintained by the Executive Director in the interest of the Organization given the present financial constraints which permit him to retain only those staff who are turning in a high all-round standard of performance in accordance with the established criteria in this connexion.

Your last day of work will, therefore, be today Monday, 29 February 1988 C.O.B. [Close of Business]. Two extra days in lieu of travel time (i.e. 1 and 2 March 1988) will be added to your final payment.

In the meantime, I must convey to you the Executive Director's sincere appreciation for the service rendered to UNEP in earlier years and good wishes for whatever endeavour you and your family undertake in the future."

Having received no reply from the Secretary-General to his request for administrative review, on 27 April 1988, the Applicant lodged an appeal with the Nairobi Joint Appeals Board (JAB). The Board adopted its report on 21 March 1990. Its conclusions read as follows:

"29. The Panel concluded that the basis for non-renewal of the fixed-term contract was the purely discretionary application of internal UNEP

guidelines. It follows that their application in this case could have equally been in favour of the appellant's expectation to have his contract renewed. The Panel further concluded that the non-extension of the appellant's contract appears not justified on budgetary grounds but was brought about by a negative assessment of his performance. The Panel recognized the authority of UNEP's management to take decisions in the interest of the Organization which are intended to keep up the high performance level of its professional staff.

30. The Panel is also of the opinion that the circumstances of the appellant's transfer to a post for which he did not consider himself qualified, and his placement after transfer under the same supervisor against whom he had alleged a personal bias, should have warranted extreme caution in applying the guidelines against the interests of the appellant. As he did not possess the required qualifications for the new assignment, he should have been given extensive training by his supervisor,and been allowed reasonable time to perform the new duties at the expected level. Under these circumstances, the Panel found it questionable to carry out a PER after little more than one year in the new position, and nine months before the expiry of his final FTA [Fixed-Term Appointment]. In addition, the Panel noted that no PER was done at the expiry of his final contract.

31. As the separation of the appellant from UNEP was based solely on his last two PERs, it, therefore, appears reasonable to the Panel that all the factors mentioned above mitigated [sic] against the appellant receiving a performance rating acceptable to UNEP management which would have allowed the appellant to continue his employment with UNEP. In fact, it is the feeling of the Panel that his supervisors should have expected a performance on the part of the appellant in certain key areas of the PER which would not be at par with his colleagues performing the same duties (all of which have between 6 to 8 years experience on the post) and, therefore, his supervisors should have given the appellant sufficient time to perform reasonably well on his post before evaluating him. This opportunity, in the view of the Panel, was denied the appellant and, therefore, the Panel feels that the appellant is due some form of compensation to redress his grievances.

32. On the other hand, as there is no certainty that the appellant's performance would have improved had he been given more time to perform at a level acceptable to his supervisors, the Panel refrains from recommending the reinstatement of the appellant. In the opinion of the Panel, therefore, and taking into account all of the observations noted in the preceding paragraphs, the most suitable form of compensation would be a payment by the Organization in the form of full contribution to the Pension Fund (employer's and beneficiary's shares) for the period of five years, so as to enable the appellant to receive full retirement benefits when he reaches the age of 60."

On 16 April 1990, the Acting Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the Board's report and informed him as follows:

"The Secretary-General has re-examined your case in the light of the Board's report and noted that you were serving on a one-year fixed-term appointment under staff rules 109.7(a) and 104.12(b) which expired automatically and did not carry any expectancy of renewal or of conversion to any other type of appointment, as provided for in your Letters of Appointment. The Executive Director of UNEP decided within his prerogative not to renew your fixed-term appointment in accordance with the internal UNEP guidelines, based on the evaluation of your work performance, and you were notified accordingly. The Secretary-General has therefore decided to maintain the contested decision.

Notwithstanding the above, the Secretary-General has decided, taking into account the entire circumstances and that you were granted a final two-month extension to allow the Nairobi Grievance Panel to complete the review of your case, to grant you an ex-gratia payment in the amount of three months net base salary, in final settlement of the matter.

..."

On 22 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contention is:

The decision not to renew the Applicant's contract was arbitrary and imputable to "several personal disagreements" with the First Reporting Officer.

Whereas the Respondent's principal contentions are:

1. The Respondent had the discretionary authority not to renew the Applicant's appointment.

2. The Applicant had no reasonable expectancy of the renewal of his fixed-term appointment.

3. The Respondent fulfilled his obligation to give the Applicant every reasonable consideration for a career appointment, pursuant to the applicable General Assembly resolution.

4. The Respondent properly exercised his discretion in reaching a decision on the JAB recommendation.

The Tribunal, having deliberated from 28 October to 12 November 1993, now pronounces the following judgement:

I. The Applicant had a long period of service with the United Nations. It began in 1967 and lasted for 20 years. During this time, he was given many fixed-term appointments and awarded several promotions. His career culminated with his appointment as Fund Management Officer with UNEP but it came to an unhappy end in 1987, when his contract was not renewed.

II. The Applicant's record, since 1967, is of significance in considering the non-renewal of his contract. His repeated fixed-term contracts and his promotions attest to the fact that, during the period leading up to his final years, he was, at the very least, considered to be an efficient and capable worker.

III. The Applicant's troubles began with his assignment to the post of Fund Management Officer in January 1985. He was transferred to a job for which he had no training and experience. An added

difficulty, according to the Applicant, was that he had to serve under a First Reporting Officer with whom he had had problems previously. According to the Applicant, there was friction between himself and this officer because, on the instructions of the Deputy Executive Secretary, the Applicant reported directly to the latter, bypassing the First Reporting Officer.

IV. This brings the Tribunal to the central aspect of the case, namely that the Applicant was transferred to a new post, for which he had no experience and no training, a fact which has not been disputed; that while he was working in the new post, the First Reporting Officer prepared two performance evaluation reports which were rebutted by the Applicant. On the basis of these reports, after they were rebutted by the Applicant and indeed, some of the ratings upgraded, the Applicant's fixed-term contract was not renewed, under the guidelines established by the UNEP Executive Director.

V. The Tribunal has considered the various reports and, in particular, the performance evaluation reports dealing with the periods, 1 January 1985 - 28 February 1986 and 1 March 1986 - 31 March 1987. It has also considered the documents related to the performance evaluation reports and noted the adverse criticism, some of it severe, by the First Reporting Officer. However, despite such criticism, the Tribunal is of the view, that the performance evaluation reports in themselves, do not provide evidence of a bias on the Reporting Officer's part against the Applicant. In general, they indicate that the Applicant had substantial ability in many areas.

VI. Nevertheless, the performance evaluation reports did provide the Administration with the basis on which to dispense with the Applicant's services. For this purpose, the following UNEP guidelines were brought into play:

> "Staff in the Professional and above categories and General Service category of the G-6 and above levels who, although rated 'very good' need to improve their performances. If there is a 'C' or 'D' in the area which is marked 'specially important' in the performance evaluation report form, the extension may not be granted."

The Applicant was awarded 'C' in at least one area marked specially important and, so, on the basis of the strict application of the Executive Director's guidelines, his contract was not renewed, even after the rebuttal and upgrading.

VII. There is disagreement between the Applicant and the Respondent as to whether the job he held prior to his appointment as Fund Management Officer was abolished. Wherever the truth lies, the Applicant ended up in this new job, for which he was unprepared. The Tribunal feels that it is reasonable to conclude that the Applicant's perceived inability to cope with the job and of remaining unsuited to it must have resulted from his not having been given sufficient preparation and training. The Applicant's ability to carry out his work under all his previous contracts indicates that if he had been given adequate time and sufficient training in this new post, the probability is that he would have overcome the difficulties. This, in the Tribunal's view, was the background against which the contract was not renewed.

VIII. The Respondent's case is that the Applicant did not have any expectancy of renewal of his fixed-term appointment. The Respondent refers to staff rule 104.12(b):

> "the fixed-term appointment, having an expiration date specified in the letter of appointment, may be granted for a period not exceeding five years to persons recruited for service of prescribed duration, including persons temporarily seconded by national Governments on institutions for service with the United Nations. The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment."

IX. The Applicant had worked for the United Nations for many years. While a fixed-term contract does not, in itself, carry an expectancy of renewal, the Applicant was, surely, entitled to every reasonable consideration for further appointment. The Tribunal notes that some consideration was accorded to the Applicant in relation to certain other posts. However, it does not view these efforts as sufficient, under the circumstances of this case. The lack of further consideration was all the more significant, in the view of the Tribunal, because the Administration brought about the situation which gave rise to his difficulties by appointing him to the post in question and then failing to support him. Indeed, the difficulties were rendered even greater because of the unsatisfactory relationship between the Applicant and the First Reporting Officer

X. Further, the Administration did not exercise sufficient care in assigning the Applicant to a position without, first of all, ensuring, in so far as it could, that he was reasonably suited to the post and in supporting him in the initial stages. It is to be noted from the report of the Panel which investigated the PERs for the period 1 March 1986-31 March 1987, that the Panel was, on the one hand, given statements that the Applicant was unsuited to the post, while some of his peers, on the other hand, said that he was "at a par with his peers". However, the Panel, in its report, describes the assessment it received, that the Applicant was unsuited, as almost unanimous. The Tribunal agrees.

XI. The Tribunal is of the view that the Administration, by employing more care in assigning the Applicant to his new post, and by helping him become adjusted to the work, could have ameliorated the situation to the point where, in all probability, the Applicant would have successfully adapted to the work.

XII. In the light of the foregoing, the Tribunal finds in favour of the Applicant. Because of losses accruing to the Applicant as a

result of the non-renewal of his appointment, including loss of pension and other benefits to which he was entitled, the Tribunal orders the Respondent to pay to the Applicant an amount equivalent to one year's net base salary at the rate in effect on the date of his separation from service.

(Signatures)

Luis de POSADAS MONTERO
Vice-President, presiding

Ioan VOICU
Member

Francis SPAIN
Member

New York, 12 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary

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16 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 627

Case No. 668: ZINNA

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Mikuin Leliel Balanda; Mr. Hubert Thierry;

Whereas, on 29 April 1992, Eduardo Zinna, a staff member of the United Nations, filed an application requesting the Tribunal, inter alia:

"1. ...

(a) to uphold the relevant unanimous conclusions and recommendations of the Joint Appeals Board in its report ... of 18 December 1991 (...), in particular:

(i) '...that the Appellant's candidature for the post of Chief, IMIS [Integrated Management Information System] Project had not been given due consideration'; and

(ii) '...that the successful candidate should not have been considered for the subject post or short-listed or selected for it and that the fact that this candidate was considered had adversely affected the Appellant's terms of employment as the inclusion of the successful candidate on the short list had reduced the Appellant's chances of success in the competition for the subject post.'

2. ...

(a) to declare null and void and rescind all administrative decisions relating to the selection, appointment and promotion of the Chief, Integrated Management Information System (IMIS) project;

(b) to order that a more qualified candidate should be appointed from among those staff members who originally applied for the post;

(c) alternatively, to order the payment of appropriate compensatory damages in the amount of two years' net base salary to the Applicant, in accordance with article 9, paragraph 1 of the Tribunal's Statute; and

(d) in any case, to order the payment of appropriate damages in the amount of six months' net base salary to the Applicant as compensation for the breach of his terms of appointment resulting from the lack of proper consideration of his candidature for the subject post as well as from the arbitrariness and bad faith of the Administration."

Whereas the Respondent filed his answer on 16 September 1992;

Whereas the Applicant filed written observations on 30 April 1993;

Whereas the facts in the case are as follows:

Eduardo Zinna entered the service of the United Nations on 11 October 1969, as a Translator Trainee at the Department of Conference Services on a probationary appointment at the P-2, step I level. On 1 October 1971, he was granted a permanent appointment as a Translator at the P-3 level.

On 3 June 1974, the Applicant was transferred to the Department for Political Affairs, Trusteeship and Decolonization as a Political Affairs Officer and on 1 August 1977, to the Division for Policy Co-ordination, Planning and Information Section, Office of Personnel Services (OPS). On 1 April 1978, he was promoted to the P-4 level.

On 1 January 1981, the Applicant's functional title was changed to Acting Chief, Planning and Information Section, Division for Policy Co-ordination, OPS. The Applicant was promoted to the

P-5 level with effect from 1 April 1983. The Applicant was assigned to ONUVEN, Nicaragua, from 31 August 1989 to 7 March 1990 as Senior Election Monitor, and then to UNTAC from 8 January 1992 to 22 February 1993.

On 7 July 1989, the Applicant applied for the D-1 level post of Chief, Integrated Management Information System (IMIS) Project, in the Office of the Under-Secretary-General, Department of Administration and Management. The selection of candidates for the post was to be conducted in accordance with the procedures set forth in administrative instruction ST/AI/338 and its addenda, concerning the Vacancy Management System (VMS) then in force. At the time the vacancy announcement was issued, the Under-Secretary-General for Administration and Management had appointed with effect from 16 December 1988, another staff member, Ms. Christine Rollet "to take over ... [as Project Coordinator of IMIS] immediately since she has been involved with this project since its inception".

On 31 July 1989, the Director of Recruitment and Placement Division, Office of Human Resources Management (OHRM[1]) transmitted the Applicant's application, together with the applications of seven other candidates, to the Appointment and Promotion Board (APB). Listed in alphabetical order as meeting the requirements of the post were four candidates, the Applicant, Ms. Christine Rollet, the Acting Project Coordinator of IMIS, and two other staff members.

The APB considered all the applications and recommended, in a short-list, to the Department of Administration and Management, four staff members for final selection. Among them were Ms. Christine Rollet and the Applicant.

On 10 August 1989, the Acting Under-Secretary-General for Administration and Management informed the Assistant Secretary-General, OHRM, that he had selected Ms. Christine Rollet for the post of Chief, IMIS, with immediate effect.

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[1] Successor of OPS.

In a letter dated 29 August 1989, a Recruitment and Placement Officer informed Applicant that another staff member had been selected for the post of Chief, IMIS Project.

On 5 January 1990, the Applicant wrote to the Assistant Secretary-General, OHRM, expressing his concern "at the selection of a candidate for the post of Chief, IMIS". He asserted that "it would appear that the screening process was conducted on the basis of the candidates' fact sheets only - and with the participation of the candidate who was later selected - or rather confirmed - for the post". He expressed reservations concerning the "academic background, relevant experience or seniority" of the candidate chosen.

On 19 April 1990, the Applicant, pursuant to staff regulation 11.1, asked the Secretary-General "that a determined effort should be made to dispel my current doubts as to the selection of staff under the VMS through the clarification of the steps taken to fill the post of Chief, IMIS Project." This letter was treated by the Joint Appeals Board (JAB) as a request for review of the administrative decision appointing Ms. Chrisine Rollet as Chief, IMIS. On 19 June 1990, the Applicant wrote again to the Secretary-General and to the JAB, advising them of his intention to submit an appeal against the administrative decision regarding the appointment of the Chief, IMIS Project.

On 21 December 1990, the Applicant lodged and appeal with the JAB. The Board adopted its report on 18 December 1991. Its conclusions and recommendations read as follows:

> "Conclusions and recommendations
>
> 46. The Panel concluded that the Appellant's candidature for the post of Chief, IMIS Project had not been given due consideration.
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> 47. The Panel concluded that the successful candidate should not have been considered for the subject post or short-listed or selected for it and that the fact that this candidate was considered had adversely affected the Appellant's terms of employment as the inclusion of the successful

candidate on the short-list had reduced the Appellant's chances of success in the competition for the subject post.

48. Regarding recommendations, the Panel noted that the Appellant had requested the JAB to recommend: (i) rescission of the administrative decisions connected with the selection for the subject post, (ii) selection of a more qualified candidate from those who applied, (iii) payment of compensatory damages to the Appellant, and (iv) keeping of the commitment made to the Appellant in [Under-Secretary-General for Administration and Management's] letter of 9 March 1988. The Panel considered that it could not entertain the request under i) above, as, for one thing, it was not a practical proposition; as for ii), the Panel considered that this was beyond its competence; as for iv), the Panel did not consider that the Respondent's actions with respect to the filling of the post of Chief, IMIS Project called for such a recommendation.

49. As for compensatory damages, the Panel, while not considering compensatory damages the proper term, decided to recommend that the Appellant be paid the sum of $1,000 in recognition of the fact that his terms of employment had not been observed.

50. The Panel further recommends that in future all candidates applying in response to vacancy notices be given all the consideration to which they are entitled. The Panel further recommends that, in any arrangement which may be substituted for the VMS [Vacancy Management System] in response to the recent decision of the Administrative Tribunal in the Upadhya case, safeguards should be built in to ensure that candidates for a post from outside a unit where a vacancy occurs receive equal consideration with candidates from inside that unit.

51. Finally, the Panel recommends that in future cases all applicable provisions of Administrative Instructions be carefully observed".

On 29 January 1992, the Director, Office of the Under-Secretary-General for Administration and Management transmitted to the Applicant a copy of the JAB report and informed him of the Secretary-General's decision as follows:

"The Secretary-General does not agree with the Board's conclusions in paragraphs 46 and 47 of the report. It should be noted that, under paragraph 4 of ST/AI/338/Add.2, then in effect, a staff member who did not meet the seniority requirement for promotion set out in this paragraph could exceptionally be selected for placement under the vacancy management system and subsequently promoted on an accelerated basis. In this case, such an exception was made in view of the fact that the selected candidate was a staff member of unusual potential and with an exceptionally outstanding record of performance who met the minimum seniority for accelerated promotion as established by the Appointment and Promotion Board, namely, three years in the case of promotion from P-5 to D-1. Paragraph 14(f) of ST/AI/338/Add.5, then in effect, set out guidelines - not binding rules - concerning seniority. Such guidelines did not, however, preclude the above-mentioned exceptional selection under paragraph 4 of ST/AI/338/Add.2.

The Secretary-General has concluded that the selection of the Chief, IMIS Project, was properly based on an assessment of all the candidates on the short list. He is satisfied that his selection of an outstanding candidate as borne out by her performance record, albeit with less than five years' seniority, constituted a proper exercise of administrative discretion which did not in any way violate your rights or those of any other staff member on that short list. Accordingly, the Secretary-General does not accept the Board's recommendation for payment of compensation".

On 29 April 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The assignment of the Chief, IMIS Project on 16 December 1988, to the post was in violation of administrative instruction ST/AI/338 of 21 December 1986, paragraph 3, which provides that "programme managers may continue to reassign staff within their office to posts at the same level but not to higher level posts".

2. The Applicant was not properly considered for the post in question, nor for that matter was any other candidate, except Ms. Christine Rollet.

3. The Applicant's rights under his terms of appointment were adversely affected by the non-observance of the VMS procedures, resulting in the assignment of Ms. Christine Rollet to the said post.

4. The Chief, IMIS, improperly participated in the evaluation of candidates for IMIS posts, including the post for which she herself applied and such participation violated the Applicant's rights.

Whereas the Respondent's principal contentions are:

1. The assignment of staff is within the discretion of the Secretary-General. The assignment of the successful candidate to the post as an Acting Project Coordinator did not prejudge the final selection.

2. The Applicant has no right to promotion but only to due consideration of his candidacy, which it received both by the APB and the Department.

3. The selection process did not violate the Applicant's terms of employment as it was carried out pursuant to the VMS procedures.

4. The selected candidate did not participate in the evaluation of candidates for the post for which she herself applied.

The Tribunal, having deliberated from 25 October to 16 November 1993, now pronounces the following judgement:

I. In July 1989, the Applicant applied for the then newly established post of Chief, Integrated Management Information System (IMIS), at the D-1 level, in accordance with the Vacancy Management System (VMS) which was then in effect. At the time, the post was provisionally encumbered by Ms. Christine Rollet who discharged the functions of Coordinator of the Project.

II. Following the Respondent's decision to appoint Ms. Rollet permanently to the post in question, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The JAB found that although the Applicant's candidacy had not been properly taken into account by the Respondent, the selection of Ms. Rollet did not affect the Applicant's rights. The JAB recommended that the Administration grant the Applicant US$1,000 for the failure to give due consideration to his candidacy. Upon the Administration's refusal to adopt this recommendation, the Applicant appealed to the Tribunal.

III. In his application, the Applicant asks for the rescission of the decision to appoint Ms. Rollet to the post for which he had applied. He contends that Ms. Rollet participated in the selection of candidates for the post for which she was herself a candidate. He also asks for the payment of various sums as compensation for the injury he allegedly suffered.

IV. The Respondent maintains that the assignment of a staff member is within the Secretary-General's discretion and that in this case, the appointment on a temporary basis of Ms. Rollet did not prejudge the selection of the Chief, IMIS. The Respondent adds that the only right of the Applicant is to have the Administration properly examine his application but that he does have a right to be promoted. Selection of a candidate in accordance with the VMS procedures does not, the Respondent argues, affect the rights of the Applicant. The Respondent maintains that Ms. Rollet did not participate in the examination of the applications for the post for which she herself had applied.

V. The Respondent appears to question the right of the Applicant to challenge the appointment of another staff member to a post. But the Tribunal has consistently recognized that a staff member competing for a post who is directly and adversely affected by the appointment of another staff member to the post, may appeal with

respect to an alleged injury to him or her, if any, in connection therewith. Hence, the Respondent's contention on this point lacks merit.

VI. The Applicant complains about the provisional appointment of Ms. Rollet as Acting Coordinator of the project. The Tribunal notes that the provisional appointment was made because of a need to insure continuation of the project. Ms. Rollet, who had prior involvement with the project, was in a position to do so. Under the circumstances, her temporary appointment was a reasonable exercise of discretion.

VII. The Tribunal finds, in addition, and contrary to the opinion of the JAB in its report of 18 December 1991, that the selection for the D-1 post of Chief was in accordance with the provisions of administrative instructions ST/AI/338/Add.2, paragraph 4 and ST/AI/338/Add.5, paragraph 2(a) in force at the time. Thereunder, a staff member could be selected, as in the present case, without the required five years of seniority, in exceptional circumstances. The record fully supports the conclusion that Ms. Rollet was eligible for accelerated promotion on the basis of her exceptional performance and that the Respondent properly complied with the vacancy management procedures.

VIII. The Tribunal notes, as is indicated by a letter of 29 January 1992, from the Director of the Office of the Under-Secretary-General for Administration and Management, that Ms. Rollet was appointed because of her exceptional merit and performance, as attested by her performance evaluation reports.

IX. Moreover, it is evident that the Applicant, having been shortlisted by the Appointment and Promotion Board, was duly considered for the post. In accordance with its jurisprudence, the Tribunal will not interfere with the Respondent's discretion in evaluating the qualifications of staff members for appointment to a

post, as long as the Charter, the Staff Rules and any other relevant texts have been respected and no extraneous factors tainted the exercise of such discretion. The Tribunal finds no irregularities in this case.

X. In the light of the above, the Tribunal considers that the selection of Ms. Rollet, in accordance with the above mentioned administrative instructions, did not infringe the rights of the Applicant. In addition, there is no evidence, attesting to the participation of Ms. Rollet in the selection of candidates for the post.

XI. The application is therefore unfounded and the Tribunal rejects it.

(Signatures)

Jerome ACKERMAN
President

Mikuin Leliel BALANDA
Member

Hubert THIERRY
Member

New York, 16 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary

UNITED
NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/628
17 November 1993

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 628

Case No. 688: SHKUKANI

Against: The Commissioner-General of the United Nations Relief and Works Agency for Palestine Refugees in the Near East

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 7 November 1991 and 8 April 1992, Mohammad Issa Shkukani, a former staff member of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (hereinafter referred to as UNRWA), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 3 June 1992, the Applicant, after making the necessary corrections, again filed an application requesting the Tribunal to, inter alia:

"...

[Order]

8. The rescission of the decisions taken against me with the aim of reinstating me in the service of UNRWA when the Tribunal finds out that I am innocent.

9. Compensate me on all the accumulative financial losses which have been entailed since leaving the service."

Whereas the Respondent filed his answer on 22 January 1993;

Whereas, on 28 September 1993, the President of the Tribunal requested the Respondent to produce an answer on the merits, which he did on 12 October 1993;

Whereas, in a series of communications, the last dated 2 November 1993, the Applicant commented on the Respondent's submission;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNRWA on 20 May 1970, on a temporary indefinite letter of appointment, as an area staff member. He served continuously in that capacity until he separated from service, on 11 November 1989.

At the time of his separation from the Agency, the Applicant held the post of Distribution Team Leader, grade 6, in the Jerusalem Area. As a Distribution Team Leader, the Applicant was responsible for supervising the distribution of food to refugees in his service area, for keeping records and for accounting for all such food supplied, in accordance with UNRWA Regulations.

During the period 16 May to 15 June 1989, the Administration undertook an operational audit of the Supply, Distribution and Warehousing Operations in the West Bank, as a result of a concern that pilferage was taking place there. In a surprise visit to the Jerusalem Area Stores, where the Applicant was the Distribution Team Leader, the auditor discovered irregularities. These included the excessive loading of commodities on trucks for daily distribution, for which the Applicant was unable to provide a plausible explanation.

Subsequently, the auditor made a second surprise visit to the Jerusalem Area Stores and found additional irregularities. Based on the above findings, the auditor recommended that a Board of Inquiry

be established to investigate the distribution operations of the Jerusalem Area Stores.

A Board of Inquiry was appointed on 23 August 1989. The Board interviewed the Applicant on three occasions. It also interviewed 18 witnesses. The Board considered a study undertaken by the Field Relief Department, which established substantial discrepancies between the Applicant's records and the stock actually available. The Board also found that the Applicant's Distribution Team almost uniformly failed to follow Agency rules and guidelines regulating the storage and distribution of commodities. It found evidence of the misappropriation of commodities handled and distributed by the Applicant.

The Board found that the Applicant, and other staff, had been involved in the misappropriation of commodities and had engaged in serious misconduct.

After consideration of the report, the Director of UNRWA Operations, West Bank, informed the Applicant, in a letter dated 11 November 1989, that his appointment would be terminated in the interest of the Agency, pursuant to area staff regulation 9.1, with effect from that date. The letter stated that this action was taken on the basis of the investigation conducted by the Board of Inquiry and its discovery of his "involvement in irregularities in the distribution of commodities".

In a letter dated 13 November 1989, the Applicant requested, pursuant to area staff rule 111.3(1), that the decision to terminate his service be reviewed. In a reply dated 21 November 1989, the Field Director confirmed the Agency's decision to terminate the Applicant's appointment. On 5 December 1989, the Applicant lodged an appeal with the Joint Appeals Board (JAB). The Board adopted its report on 18 May 1990. Its conclusions and recommendation read as follows:

> "(a) It is clear from both the report of the Auditors and the Board of Inquiry that there were irregularities and discrepancies in the distribution and the records thereof.

(b) It is equally clear that the distribution procedure was not strictly adhered to. However, the Appellant has been in his post for several years and some remedial action could have been taken during that time to see to it that he learnt the proper procedure and applied it.

(c) The Appellant's records of service indicate a progression in his career which would imply that his services were satisfactory all along.

(d) The exceptional situation prevailing in the area is by itself not very conducive to a strict appl_cation of the rule book in view of the disruptions it causes and the necessity to meet basic requirements of a population in times of emergency.

(e) The Appellant is the sole breadwinner of a very large family (11 children all of them of school age). The decision to terminate his services seems to the Board to be too severe especially in the absence of any previous warning.

7. In view of the above, the Board is of the opinion that a less drastic disciplinary measure would have been preferable, especially in view of the severe hardship the decision to terminate his services will no doubt cause.

8. Therefore, the Board would like to recommend to the Commissioner General that the Appellant be reinstated in a different position where he could still usefully serve the interests of the Agency."

On 12 July 1990, the Commissioner General transmitted to the Applicant a copy of the Board's report and informed him as follows:

"... The Board has not found that the Agency's decision to terminate your services was motivated by prejudice or other extraneous factors; nevertheless, the Board has recommended that I reconsider the earlier decision with a view to applying a different disciplinary measure.

I have carefully reviewed your case once again, but regret I do not consider it appropriate to vary the decision to terminate your services with the Agency."

In letters dated 31 July and 24 August 1990, the Applicant appealed to the Special Panel of Adjudicators, pursuant to area staff regulation 11.2 and area staff rule 111.4 then in force, against the Commissioner General's decision of 12 July 1990, to confirm the termination of the Applicant's service.

The Special Panel of Adjudicators rendered a judgement on 17 May 1991. Its considerations and decision read, in part, as follows:

> "7. ...the irregularities in the distribution of UNRWA food to persons in need on the West Bank were so serious and extensive that the decision to dismiss the Applicant's appeal must be upheld, despite the difficulties in organizing and keeping satisfactory account of food distribution under the prevailing circumstances. As Distribution Team Leader the Applicant has to be held responsible for these irregularities.
>
> 8. The Panel of Adjudicators has given due consideration to the satisfactory service of the Applicant to UNRWA for twenty years and to his numerous family, but considers all the same that the irregularities in food distribution under his supervision were of such gravity as to justify this stern sanction.
>
> 9. The Panel deems redundant the finding of the JAB on lack of adequate warning. The two checks subsequent to the first audit show no effort on the part of the Applicant to stop the irregularities.
>
> Decision
>
> 10. For these reasons the Panel of Adjudicators uphold the decision of the Commissioner-General to terminate the Applicant's appointment in the interests of the Agency under Area Staff Regulation 9.1 with effect from 11 November 1989."

On 3 June 1992, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The decision by the Commissioner-General was motivated by improper motives.

2. The Commissioner-General's decision to terminate the Applicant's appointment was premised on the findings of a Board of Inquiry, which was biased against the Applicant.

3. The Commissioner-General's decision should be reversed on the basis of humanitarian concerns, namely that the Applicant has a number of children in need of support.

Whereas the Respondent's principal contentions are:

1. The Area Staff Regulations and Rules governing the Applicant's appointment at the time of its termination did not assign jurisdiction to the United Nations Administrative Tribunal, which is therefore without competence ratione materiae to entertain the present application.

2. The United Nations Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991.

3. The Agency's termination action was taken, pursuant to the report of a Board of Inquiry, which resulted from an audit. This report explains in detail the serious irregularities in the distribution of commodities under the Applicant's charge.

4. The Applicant's appointment was terminated, pursuant to the Commissioner-General's power to terminate appointments in the interest of the Agency, under area staff regulation 9.1.

5. The report of the Board of Inquiry establishes numerous discrepancies in the accounting of commodities under the supervision and control of the Applicant as Team Leader.

The Tribunal, having deliberated from 2 to 17 November 1993, now pronounces the following judgement:

I. The Respondent's first legal argument is that, at the time of the termination of the Applicant's service with UNRWA, the Area

Staff Regulations and Rules did not assign jurisdiction to the United Nations Administrative Tribunal, which is, therefore, without competence to entertain the present application.

The argument is based, first of all, on the fact that the Applicant was an area staff member and, therefore, subject to the Area Staff Regulations and Rules. These Regulations and Rules were amended on 14 June 1991, to give staff members a broader range of remedies in respect of administrative disciplinary decisions taken by the Agency. As the Applicant's appointment was terminated on 11 November 1989, he comes under the scope of the Rules and Regulations that obtained prior to that date.

II. The Applicant initially made an unsuccessful bid to the Agency to have his termination reviewed. He then appealed to the Joint Appeals Board (JAB) which made recommendations in May 1990. As the Commissioner-General of UNRWA did not accept them, the Applicant appealed to the Special Panel of Adjudicators. After various submissions from both sides, the Special Panel found in favour of the Commissioner-General, on 17 May 1991.

III. In his legal argument, the Respondent sets out the background to this case. He records that UNRWA is a subsidiary body of the General Assembly, established under General Assembly resolution 302(iv) of 8 December 1949, to deal with a specific emergency situation. Because the Agency was of a temporary nature, the General Assembly granted the Commissioner-General of UNRWA broad powers to deal with all aspects of its work, including the recruitment and management of staff. Thus, under paragraph 9(b) of General Assembly resolution 302(iv), the Commissioner-General was authorized to "select and appoint his staff in accordance with general arrangements made in agreement with the Secretary-General, including such of the Staff Regulations and Rules of the United Nations as the Commissioner-General and the Secretary-General shall agree are applicable."

IV. According to the Respondent, a very limited number (about 175) of the approximately 19,000 UNRWA staff belongs to the category of international staff, governed by a set of Staff Regulations and Rules known as the International Staff Regulations and Rules. This category has always had access to the Administrative Tribunal. The balance of the UNRWA staff is governed by the Area Staff Regulations and Rules. Prior to the amendment of 14 June 1991, chapter XI of the Area Staff Regulations provided for recourse procedures. Under these procedures, the Commissioner-General is to establish a JAB with staff participation to advise him in case of any appeal by a staff member against an administrative decision to terminate him/her, in respect of which he/she alleges the non-observance of his/her terms of appointment, including all pertinent Regulations and Rules, or against disciplinary action under regulation 10.3. This regulation goes on to provide for the composition of the JAB. Finally, the regulation provides that any unanimous recommendation by the JAB which is accepted by the Commissioner-General, shall bar the staff member in the case concerned from any further appeal to a special panel of adjudicators.

V. Regulation 11.2(A) provides for such a panel of adjudicators. Its members are to be of high professional and international standing. Staff members may, in certain circumstances, make application against an administrative decision or disciplinary action. Regulation 11.1(B) provides that judgements of the Special Panel of Adjudicators shall be final and without appeal. The amendment already referred to provides for a hearing by the Administrative Tribunal on applications from staff members alleging non-observance of their terms of appointment.

VI. The Respondent contends that the Commissioner-General established a Special Panel of Adjudicators of high standing. He says that, as an area staff member, the Applicant was governed, at the time of his separation, by a special set of Staff Regulations and Rules, authorized by the General Assembly, providing special

organs to resolve disputes. No reference was made in these regulations and rules, which are the only ones governing the Applicant's appointment, to the Administrative Tribunal. The Respondent refers to Judgement No. 70, Radicopoulos vs. UNRWA, which, he says, recognized that the right to make applications to the Tribunal can be denied in certain cases.

The Respondent says that the Applicant exercised his right to appeal to both appellate bodies. The Respondent's contention, therefore, is that the Administrative Tribunal has no competence ratione materiae to review the substance of the administrative decision to terminate the Applicant's services, or to exercise appellate powers over bodies that did have competence in respect of the Applicant and exercised their jurisdiction.

VII. The Respondent makes the further point that the Administrative Tribunal is without competence ratione temporis to hear applications from UNRWA Area staff members when the cause of action arose before 14 June 1991. The Respondent argues that the amendment of 14 June 1991, should have a prospective and not a retrospective effect. He also makes the practical point that there are reasons of policy for ensuring that all administrative decisions taken by the Agency before 14 June 1991, are not automatically open to review. There would be serious administrative problems and there would be practical difficulties, such as possible unavailability of witnesses and records. Such a state of instability would be against the interests of justice. Finally, the Respondent claims that the case is res judicata.

In considering the legal arguments of the Respondent, the Tribunal accepts that, as the termination occurred before 14 June 1991, the case must be considered in the light of the rules as they were prior to that date.

VIII. The Tribunal, in dealing with the Respondent's contention that it is without competence ratione materiae to entertain the application, must take cognizance of its own previous approach in

this area. The Tribunal considers that the Respondent's reference to Radicopoulos is selective. In that case, while indicating that no mandatory provisions instituting another procedure had been laid down at the relevant time, the Tribunal considered itself competent to deal with an application on the basis of the agreement, pursuant to General Assembly resolution 302(iv). Again, in the earlier 1955 case of Hilpern, the Tribunal rejected the Respondent's contention that "the Tribunal is competent to hear applications from staff members of the United Nations Secretariat only". The Tribunal refers to these early cases merely to indicate that it was of the view that it was not precluded from hearing cases involving staff members such as the Applicant, there being the lack of a judicial forum for dealing with such cases.

IX. In the more recent case of Zafari (Judgement No. 461), the Tribunal made reference to the following opinion of the International Court of Justice of 13 July 1954 "It would, in the opinion of the Court, hardly be consistent with the expressed aim of the Charter to promote freedom and justice for individuals and with the constant preoccupation of the United Nations Organization to promote this aim that it should afford no judicial or arbitral remedy to its own staff for the settlement of any disputes which may arise between it and them (Effect of Awards of Compensation made by the United Nations Administrative Tribunal, Advisory Opinion of 13 July 1954; I.C.J., Reports 1954, p. 57)."

X. The Tribunal has, in previous cases, referred to considerations of the International Court of Justice concerning the extent of the competence conferred on the ILOAT, because the Tribunal deemed that such considerations were equally valid for UNAT. The relevant passage, from judgements of the Administrative Tribunal of the ILO in cases brought against the United Nations Educational, Scientific and Cultural Organization (ICJ, Reports of Judgements, Advisory Opinions and Orders, 1956, p.97) is as follows: "However, the question submitted to the Tribunal was not a dispute

between States, It was a controversy between UNESCO and one of its officials. The arguments, deduced from the sovereignty of States, which might have been invoked in favour of a restrictive interpretation of provisions governing the jurisdiction of a tribunal adjudicating between States are not relevant to a situation in which a tribunal is called upon to adjudicate upon a complaint of an official against an international organization."

The Tribunal therefore has consistently held the view that it is competent to entertain cases, such as this one, where the primary concern is the absence of any judicial procedure established by the Area Staff Regulations and Rules for the settlement of disputes submitted to JAB.

XI. The central point of the Respondent's case is that the Applicant's case was heard by both bodies set up for the purpose under the relevant Regulations and Rules. The bodies to which the Applicant had recourse were both internal bodies as indicated by the method of appointment of their members. The Applicant should have had available to him, in fairness and equity, an external judicial body to which he could have appealed. Indeed, the fact that the international staff members of UNRWA had such recourse, shows even more starkly the bias which existed against the Applicant and his class of staff members. Why should not all staff have similar protection? The Tribunal, therefore, rejects the Respondent's first argument.

XII. The Respondent's second argument is that the Tribunal is without competence ratione temporis. This argument need not now be dealt with, in view of the Tribunal's considering the case on the basis of rules existing prior to 14 June 1991.

Again, as a result of its finding on the first argument, the Tribunal need not pursue the Respondent's third legal contention that the matter is res judicata. The Tribunal merely observes that if any argument exists to support the Respondent's view that the matter is res judicata, it must be superseded by the Applicant's

entitlement to a hearing by the Tribunal. Finally, the Tribunal cannot sustain the argument based on reasons of policy or on the administrative problems and practical difficulties which would otherwise arise, for upholding the Respondent's legal arguments. Any such policy or difficulty cannot be held to negate the principles of equity and justice which must be paramount.

XIII. The Applicant was a Distribution Team Leader in the Jerusalem Area. He was responsible for supervising the distribution of food to refugees in his service area, for keeping records and for accounting for all such food supplies in accordance with the Agency's Regulations.

There was suspicion of pilfering in the Applicant's Area which resulted in an Audit of the Supply, Distribution and Warehousing Operations in the West Bank Field, between 16 May and 15 June 1989. Two surprise visits to the stores in which the Applicant was the Distribution Team Leader, resulted, according to the Respondent, in the discovery by the Auditor, of irregularities. These irregularities included the Applicant's excessive loading of commodities on trucks for daily distribution for which the Applicant is said not to have provided a plausible explanation. During the second visit, the Applicant's son is alleged to have forcibly prevented the auditor from examining certain supplies.

XIV. Because of these happenings, a Board of Inquiry was set up. This Board heard the Applicant on three occasions and interviewed 18 witnesses. The Board also had at its disposal a report of a study undertaken by the Field Relief Department, which the Respondent says, found substantial discrepancies, over a short period, between the Applicant's records and the corresponding stock available. The Board found that the Applicant's Distribution Team failed to follow Agency rules and guidelines regulating the storage and distribution of commodities. It also found that commodities had been misappropriated. The Internal Audit indicated a lack of respect for procedure and the auditors' suspicions were aroused.

The Board of Inquiry concerned itself with discrepancies in the distribution of basic commodities and irregularities in the distribution of rations to nursing and pregnant women, based on a study undertaken by the Relief Department.

The study, in relation to distributions carried out over the period 22-29 July 1989, found substantial discrepancies in the balance of stock remaining after the distributions, between the figures for remaining stock quoted in the records of the Team Leader and the Head Storekeeper, and the actual figures for returned stock. It seems that the Head Storekeeper and the Team Leader could not account for such discrepancies.

XV. It appears that the Board of Inquiry also found departures from established Agency practices i.e. returned commodities were placed in the Team Leader's own distribution store (a store he was permitted to operate adjacent to the main warehouse) rather than the main warehouse; no load note accompanied the returned commodities back to the distribution store; the Team Leader used to issue a load note to himself to cover the goods and the note was not signed by the driver; there was departure from Agency practice in the entries in the books regarding goods returned (although this appears to have involved the Head Storekeeper to a greater extent than the Team Leader); substantial discrepancies were found in the Team Leader's distribution book - the Team Leader could not explain these discrepancies. There was evidence from a daily-paid labourer of covert activities involving the Team Leader receiving money from truck drivers. On one occasion, he saw a trucker and his son loading bags of flour from the distribution store into his private vehicle about an hour after the distribution was closed. This was done in the Team Leader's presence. There was a further incident, described by this labourer, of his being ordered by the Team Leader to hand over rations to a flour distributor, the Team Leader saying that no ration cards had been produced. Following this, the labourer was told by the Team Leader to take any oil or flour that he wanted. This was interpreted by the labourer as a bribe. The

Board says that they found the labourer, Mr. Toumaley, totally credible, although the incident was denied by both the Team Leader and the distributor. There was further information from an anonymous source which the Board of Inquiry presumably took into account, but which must be regarded as of no value as it was anonymous.

XVI. The Board report also refers to excess commodities in the truck which the Team Leader said were for distribution to nursing and pregnant women. This was discovered in the course of the Audit. However, the Board discovered that up to 40% of the ration card numbers recorded on the distribution list, belonged to persons who were dead, absent from the West Bank or who were not in possession of valid cards claiming relief as nursing or expectant mothers. There were many changes in the coupons taken from the clinic. A check of ration cards of nursing and pregnant women revealed many cases in which registration numbers had been changed, dates had been altered and the registration office stamp did not appear on the coupons. A proportion of every distribution list had been completed by the Team Leader. There were explanations, which were unconvincing, in the view of the Board, for the practice of the Team Leader's completing the list.

The Board also concluded that there had been manipulation of the flour scale, rather than its being faulty, as the Team Leader claimed.

The Board finally concluded that there were large discrepancies in the distribution of each of the commodities for which the Team Leader could not give any credible explanation. The Board's finding was that the entire team was involved in the intentional misappropriation of commodities and therefore, guilty of serious misconduct.

XVII. The Applicant's case is based on many different points. Only some of the most important need to be mentioned. The Applicant says that he was following the example of his predecessors; that all

responsible officials who came from UNRWA, either from Vienna or from the West and East Banks, saw the system and the Applicant was never asked to change it; that he believed his method of work was the correct one; that he did his utmost in difficult circumstances; that he was living and working in difficult political circumstances; that he did everything in conformity with regulations; that the enquiry into the figures resulted in mistaken findings; that while the Applicant worked for many years in Distribution, the Inspectors said that the distribution process was satisfactory; that the supervisors saw the procedure that he followed and, indeed, his system was the same as that in Nablus and Hebron. He makes reference to the keys of the stores being in his possession and that the area officer knew this; he says that, because of the many distribution teams in the area, merchants throughout the areas used to buy commodities from the refugees and sell them in the towns and villages in the West Bank; he paints a picture of many refugees as being too busy or ill or old to queue so they gave the merchants their ration cards. He says that his children were not working in the Centre, they were there only because the schools were closed; his description of what can be described as "the Biddo incident" is one in which his physical courage is supposed to have saved the situation rather than the Board's interpretation of refugees angry and impatient with the conduct of the distribution process, which the refugees regarded as corrupt.

The Applicant also makes a more personal plea, pointing out that he supports a large family, referring to the high cost of living and to political difficulties in the area in which he resides. He says that his dismissal destroyed his whole family.

XVIII. The Tribunal is of the view that the only reasonable conclusion on the evidence is that the Applicant was involved in dishonest practices in accordance with the findings of the Board of Inquiry and the Audit. The Tribunal has reached this conclusion on the basis of the findings which resulted from the examination of the

relevant books and documents, rather than from any verbal evidence which was given.

The Applicant was accorded reasonable opportunities of answering the charges and he was unable to do so. That part of his defence based on the proposition that the system was known to those in positions of higher authority, cannot be accepted by the Tribunal. His system of work could have been known only with the sort of inquiry that was in fact carried out. Equally, the Tribunal has to reject as unsustainable the Applicant's submission that he believed his method of work was the correct one. There is no possible basis on which he could reasonably have thought this to be so. Again, while the Tribunal sympathizes with the Applicant's difficult work and living conditions, this cannot, in any way, explain or excuse the Applicant's dishonest way of working, irrespective of his claim that he had worked satisfactorily in the distribution process for many years.

XIX. The Tribunal therefore rejects the Applicant's appeal.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 17 November 1993

R. Maria VICIEN-MILBURN
Executive Secretary